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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PHILLIP W. DUNN, Petitioner, **v.** **KEN CLARK, Warden,** Respondent.	08-cv-0485 BTM (JMA) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS** (No Hearing Required) The Honorable Jan M. Adler

INTRODUCTION

Petitioner Phillip Dunn challenges his stipulated thirteen-year sentence following a negotiated guilty plea in 2003 and conviction for the crime of burglary. His Petition is untimely.

Dunn's conviction became final in April 2003. He did not appeal, and he brought no collateral challenges to the judgment until 2007. By that time, the statute of limitations had long expired. Accordingly, Respondent asks that the Petition be dismissed with prejudice.

In addition, as set forth below, Respondent consents to Magistrate Judge jurisdiction to decide this matter.

STATEMENT OF THE CASE

In an information filed on September 30, 2002, the San Diego County District Attorney charged Dunn with one count of residential burglary and one count of aggravated assault. (Lodgment 1 (trial court records) (felony complaint and information).) The information further alleged a number of prior convictions as sentence enhancements under various recidivist statutes, including a prior kidnap conviction in 1993, which would serve as a five-year serious-felony prior and also as a prior strike under California's Three Strikes law. (*Id.*)

Eventually, Dunn entered into a negotiated plea agreement, by which he agreed to plead guilty to the burglary count and to admit the prior kidnaping conviction. In return, the parties stipulated that the sentence would be a thirteen-year prison term, instead of the possible maximum term of eighteen years that Dunn faced. (Lodgment 1 (plea agreement).)

Pursuant to the terms of the agreement, the trial court sentenced Dunn to the thirteen-year term, comprising (1) the middle term of four years for the burglary, doubled because of the prior strike to a term of eight years, and (2) a consecutive term of five years for the serious-felony prior conviction. (Lodgment 1 (criminal minutes, 2/3/03) & abstract of judgment).)

Dunn did not appeal. (Pet. at 2.) Eventually, however, he brought a series of collateral challenges against the judgment at all three levels of the state courts. Those challenges commenced when, on April 16, 2007, he filed his first petition for writ of habeas corpus in the superior court. (Lodgment 2.) The petition claimed that his sentence was unlawful because the same prior conviction for kidnaping was used both to double his punishment under the Three Strikes law and to authorize the five-year enhancement for a serious-felony prior. That petition was denied on June 7, 2007. (*Id.*)

In the order denying the petition, the trial court explained that existing state precedent clearly permitted both forms of increased punishment for the prior conviction. In addition, the court also responded to a somewhat confusing portion of Dunn's petition that suggested he was complaining that his sentence violated the principle recently set forth in the decision of the United States Supreme Court in *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). The court explained that the *Cunningham* decision, regarding California's procedure that permitted the trial court to impose upper terms based solely on judicial fact finding, could not apply to him for two reasons. First, his conviction was final, and the rule in *Cunningham* could not be applied retroactively. And second, Dunn had not received any upper-term sentence. (*Id.* at 2-3.)

Dunn then filed presumably identical petitions in the intermediate court of appeal and the California Supreme Court. (Pet. at 4.) Those petitions were denied without comment or citation to authority. (Lodgment 5, 6.)

Dunn raises the same issues in the Petition now pending before this Court. The Court has directed Respondent to file a response.

STATEMENT OF FACTS

The trial court records contain no description of Dunn's crime. Since his challenge relates only to the sentence, the usual statement of facts is unnecessary and, therefore, omitted.

ARGUMENT

I.

THE PETITION IS BARRED BY THE STATUTE OF LIMITATIONS PURSUANT TO 28 U.S.C. § 2244 (D) AND THEREFORE SHOULD BE DISMISSED WITH PREJUDICE

Because the present Petition was filed after April 26, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Smith v. Robbins*, 528 U.S. 259, 268 n.3, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). As amended by AEDPA, 28 U.S.C. § 2244(d) now provides for a limitations period of one year.[1/]

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1. The statute provides as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable

For Dunn, his state judgment became final at the expiration of the time period during which he might have brought an appeal. In California, that is sixty days after proceedings have concluded in the state trial court. Cal. Ct. R. 31(d); *Lewis v. Mitchell*, 173 F. Supp. 2d 1057, 1060 (C.D. Cal. 2001). Since Dunn's judgment was entered on February 3, 2003, (Lodgment 1 (abstract of judgment) his conviction became final sixty days later, on April 4, 2003.

The statute of limitations ordinarily commences on the day following finality, and it normally would expire one year later, on April 4, 2004. Since Dunn did not constructively file[2/] his federal Petition until, at the earliest, March 13, 2008 (Pet. at 12 (date of signature)), the Petition is untimely unless he is entitled to a later start date for the commencement of the limitations period or unless he is entitled to sufficient tolling. Neither circumstance makes the current Petition timely.

A. Commencement Of The Limitations Period – No Later Start Date Applies

Normally, the statute of limitations begins to run on the day following finality, Fed. R. Civ. P. 6(a), unless one of three exceptions apply. 28 U.S.C. § 2244(d)(1)(B)-(D). None of the exceptions applies to Dunn: there was no state impediment to his seeking further relief; his claims do not rely on any new constitutional right determined by the United States Supreme Court to be retroactive; and the factual predicate for his current claims – the nature of his sentence – was known by the time his conviction was final.[3/]

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to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

2. Under the mailbox rule of *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988), an incarcerated pro se prisoner's pleading is deemed filed at the moment of delivery to prison officials. This mailbox rule has been extended to both state and federal habeas corpus petitions for purposes of applying the AEDPA statute of limitations. *See Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999).

3. The operative knowledge is of the important facts, not their legal significance. *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001). Dunn's claims all rely on facts that he knew at the time his judgment was final.

Accordingly, the statute of limitations commenced on April 5, 2003, and would have expired one year later, on April 4, 2004, absent tolling. As will be seen, Dunn is not entitled to any statutory tolling, and he has not established a basis for equitable tolling.

B. Dunn Is Not Entitled To Statutory Tolling

A petitioner has the burden of demonstrating facts supporting tolling. *See Pace v. DiGuglielmo*, 544 U.S. 408, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669 (2005); *Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2005) (as amended); *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002). Dunn is unable to demonstrate any statutory tolling.

No state petition was constructively filed until April 8, 2007. (Lodgment 2 at 6 (date of signature).) This was three years after the expiration of the one-year limitations period. Since the limitations period had expired, none of his three state petitions have a tolling effect. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

C. Dunn Is Not Entitled To Equitable Tolling

Although the United States Supreme Court has not determined whether equitable tolling may apply in § 2254 cases, the Ninth Circuit has found such tolling to be applicable in rare cases. But, before equitable tolling may be considered, a petitioner must establish at least two elements "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006) (quoting *Pace*, 544 U.S. at 408); *Gaston*, 417 F.3d at 1034.

Dunn has made no claim for equitable tolling, and no basis for such tolling is apparent. Accordingly, the current Petition is untimely.

II.

CONSENT TO MAGISTRATE JUDGE JURISDICTION

Dunn has consented to magistrate jurisdiction over this proceeding. (Pet. at 11.) Respondent hereby similarly consents.

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CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition with prejudice as untimely and deny any future request for a certificate of appealability.

Dated: June 26, 2008

Respectfully submitted,

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